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No. 08-1163

Supreme Court, U.S.
FILED
APR 17 2009
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In The

Supreme Court of the United States

JOHN J. GARRETT,

Petitioner,

v.

LISTER FLYNN & KELLY, P.A., TONEY LISTER, AND BRENDAN DELANEY,

Respondents.

On Petition For Writ Of Certiorari To The South Carolina Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARAI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition where the opinion of the state court of last resort has not decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

II. Whether Petitioner has presented compelling reasons to grant the Petition where a state court has not decided an important question of federal law that has not been, but should be, settled by this Court, nor has decided an important federal question in a way that conflicts with relevant decisions of this Court.

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COUNTERSTATEMENT OF THE CASE AND REASONS TO DENY THE WRIT

Initially, we point out that Petitioner failed to comply with Supreme Court Rule 14(1)(g)(i), which requires specifics about when and how a federal question was timely and properly raised in the state courts. Petitioner cannot comply with this rule because he did not timely and properly raise a federal question before the trial court.

Factually, this case is about Petitioner's failure to commence his action against Respondents within South Carolina's statute of limitations, which resulted in his suit being dismissed, with prejudice. Because Petitioner's "Question" and his "Statement of the Case" are difficult to follow and incomplete, Respondents are obliged to present the history of the case in order to meet their requirement to address any misstatement of fact.

Petitioner filed suit papers against Respondents in a timely manner but, due to defective service, failed to *commence* his action within the applicable statute of limitations' time limits. In South Carolina, a grace period is provided to one who files his summons and complaint within the statute of limitations but does not achieve service within the statutory period, provided that service is achieved within 120 days from filing. This grace period is available to one and all. South Carolina law specifies how service must be made. An action is not commenced unless proper service is achieved within 120 days after suit

is filed, which is where Petitioner fell short. Petitioner's efforts to serve the three Respondents were *timely*, but they were *defective*. Respondents moved to quash Petitioner's defective service and the motion was argued before the trial court. The trial court agreed that service was defective and that suit had, therefore, not been commenced within the statute of limitations, and accordingly the suit was dismissed, with prejudice. (Order, App. E, pp. 18a-28a.) The South Carolina Court of Appeals found that the trial court had ruled properly and further found that Petitioner had failed to preserve various issues for appeal. (Opinion, App. A, pp. 1a-12a.) The South Carolina Supreme Court denied Petitioner's Petition for Writ of Certiorari. (App. C, pp. 14a-15a.)

The relevant time sequence that led to the dismissal of Petitioner's suit follows. These facts are condensed from the order of the trial court and the opinion of the Court of Appeals. On February 28, 2005, Petitioner filed his summons and twenty-six page complaint. In the Complaint, Petitioner asserted that the Respondent attorneys and their law firm wrongfully discharged him as a client on March 15, 2002, almost three years before suit was filed. The applicable South Carolina statute of limitations is three years and the trial court calculated that the statute of limitations ran against the underlying causes of action on March 15, 2005. Because suit was filed (on February 28, 2005) before the March 15, 2005 deadline, the statute had not run when Petitioner personally filed the summons and complaint.

Obviously, Petitioner's alleged infirmities did not prevent his timely filing of the Summons and Complaint. Petitioner could have delivered the papers to the Spartanburg County Sheriff or a process server the day he filed them and had he done so, they would have undoubtedly been served before March 15, 2005. Even so, the grace period provided specified protection for Petitioner. Because Petitioner filed his Complaint on February 28, 2005, within the three year statute, he had 120 days, until June 28, 2005, to achieve proper service. Petitioner attempted service on the three Respondents in three different ways. On June 10, 2005, Petitioner personally attempted service on Delaney by going to his office, but service by a party is not permitted under the rules. Ten days later, on June 20, 2005, Petitioner attempted to serve the Respondent law firm by Registered Mail but delivery was not restricted to the law firm's Registered Agent as required and the Registered Agent did not sign for the delivery; therefore, this service was defective. On June 21, 2005, Petitioner attempted to serve Respondent Lister by regular mail which is not sufficient under the service statutes. In oral argument before the trial court, Petitioner admitted his failure to properly serve Defendants before the running of the 120 days from the filing date.

In his Petition for Writ of Certiorari to this Court, Petitioner contends that he was prevented by medical condition from acting in a timely fashion and suggests that his proceeding *pro se* should have some relevance. However, the trial court noted that

although Petitioner is a non-lawyer, he seemed quite adept at the legal process. (Order, App. E, p. 19a.) The court also observed that the records of the Spartanburg County Clerk of Court's Office revealed that Petitioner had been and was then currently involved in numerous separate lawsuits and that he represented himself in certain of those suits. (Order, App. E, p. 20a.) Finally, the trial court stated that

> [a]lthough Plaintiff argued he was medically disabled during this period of time and should be granted more time to serve Defendants, the Court takes judicial notice that Plaintiff was physically able to file at least two other suits, *pro se,* during this same period of time. Further, the Court record reveals that Plaintiff was represented by counsel in another suit about this same time period. (Order, App. E, p. 27a.)

Petitioner references a doctor's letter (Appendix G) and a doctor's affidavit (Appendix H) in support of his present Petition. This material was not properly before the trial court at the first hearing on September 8, 2005. It is noteworthy that Appendix G is dated December 12, 2005, several months after the first hearing and the same day as the hearing on Petitioner's Motion to Amend the trial court's judgment. The trial court declined to consider the letter (Appendix G) because it was not in proper form for consideration and any such letter should have been, but was not, brought before the court at the initial hearing on September 8, 2005. (Order, App. D, p. 17a.) The Court of Appeals held that Petitioner had abandoned the

issue of this letter in his appeal. (Opinion, App. A, p. 11a.) Having abandoned the issue, Petitioner cannot now raise it to this Court. Appendix H (an affidavit), dated a week before the second hearing of December 12, 2005, was not even handed to the trial court at the second hearing but could not have been considered had it been offered, for the same reasons. Appendix H was not before the trial court and, therefore, is not properly before this Court.

The cases cited by Petitioner have been reviewed. Respondents do not believe they contain any support for Petitioner's position. None remotely deals with facts such as those present here. It is Respondents' position that the citation of these cases in support of Petitioner's positions is a misstatement of the law.

CONCLUSION

In conclusion, Petitioner simply delayed almost three years, until the statute of limitations was about to run, to file his suit. Although Petitioner managed to avoid the three year deadline for filing and had the additional time of the grace period, he nevertheless failed to achieve proper service within the grace period. Rather than attempting three different types of service, he could and should have delivered the suit papers to the sheriff or a process server, who could have achieved proper service. During this time, he was filing and actively participating in other law suits. He had access to an attorney in at least one

such suit. Delay put him in jeopardy of the running of the statute of limitations. His own actions resulted in his case being properly dismissed.

Respondents respectfully submit that the Petitioner has not presented a federal question to the state courts, and he cannot properly appeal to this Court. Petitioner was treated properly by the state courts. Therefore, Respondents respectfully submit that the Petitioner's Petition for Writ of Certiorari must be denied.

Respectfully submitted,

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